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No. .....

In The
Supreme Court of the United States
October Term, 1984

THE STATE OF TEXAS,

Petitioner,

vs.

FERYL JOHN GRANGER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

1. Is a conviction the result of a violation of the Due Process prohibition against knowing prosecutorial use of false evidence where:

(A) It is obtained in necessary reliance upon the former testimony of an "unavailable" accomplice witness,

(B) That testimony is known by all parties to contain a false denial of any tacit agreement to reduce the sentence which had been imposed upon the witness, and

(C) Defense counsel is afforded a full opportunity to develop the extent to which any such agreement existed?

2. To what extent does the constitutional harmless-error rule *(Chapman v. California,* 386 U.S. 18 [1967]) apply to the rule of *Napue v. Illinois,* (360 U.S. 264 [1959]) prohibiting knowing use of false evidence by the prosecution?

LIST OF PARTIES

The following is a list of all parties of record:

The State of Texas

Feryl John Granger

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THE STATE OF TEXAS,

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vs.

FERYL JOHN GRANGER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITIONER, THE STATE OF TEXAS, prays that a writ of certiorari issue to review the judgement and opinion of the Texas Court of Criminal Appeals, in its cause number 316-83, rendered final by denial of the State's Motion for Rehearing on January 23, 1985.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals, the publication of which has been ordered, appears in Appendix A, *infra*. The opinion of the lower appellate court (the Texas Court of Appeals, Thirteenth Supreme Judicial District), is reported as *Granger v. State*, 653 S.W.2d 868 (Tex. App.—Corpus Christi 1983).

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JURISDICTION

The Texas Court of Criminal Appeals (which, in a Texas criminal case, is the court of last resort) reversed respondent's conviction on September 19, 1984. The State of Texas timely filed in that court a Motion for Rehearing which was overruled on January 23, 1985. This Court's jurisdiction is invoked pursuant to Title 28, United States Code, section 1257(3).

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CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provision of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent originally was convicted of Capital Murder. TEX. PENAL CODE ANN. § 19.03 (Vernon 1974). Because the jury answered affirmatively the special interrogatories propounded to it, punishment was assessed at death. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981); *see Jerek v. Texas*, 428 U.S. 262, 269 (1976). The conviction was based in large part upon the testimony of Mary Lou Anderson, an accomplice. Her testimony included a false denial of any expectation of reduction of her own death sentence in return for that testimony. On appeal, the Texas Court of Criminal Appeals reversed Respondent's first conviction (and death sentence), holding the evidence insufficient to corroborate[1] that portion of Mary Lou Anderson's testimony pertaining to the remunerative motive[2] for the killing. *Granger v. State*, 605 S.W.2d 602 (Tex. Crim. App. 1980).

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[1] Texas has a statutory requirement that no criminal conviction can result from the uncorroborated testimony of an accomplice. TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979).

[2] Ordinary Murder when perpetrated for remuneration becomes Capital Murder, for which the mandatory punishment is either death or confinement for life. TEX. PENAL CODE ANN. §§ 19.03, 12.31 (Vernon 1974).

Respondent, after remand, was charged by a new criminal information with Murder. TEX. PENAL CODE ANN. § 19.02 (Vernon 1974). However, at the second trial, Mary Lou Anderson steadfastly refused to testify, despite immunity and contempt. As a result, the prosecutor was forced to rely upon her testimony from Respondent's first trial. Respondent objected, claiming *inter alia* a violation of his Due Process rights.[3] Over that objection, her entire testimony was presented, including her denial of any incentive to testify. After hearing her former testimony, the jury heard testimony from her attorney and from the prosecutor, the substance of which testimony was that indeed there had been an agreement[4] and that, after she testified, her death sentence was reduced to fifty (50) years' confinement. Respondent was convicted; the jury set punishment at confinement for life.

This petition arises from the appeal from Respondent's second conviction. At the first stage of that appeal, the Texas Court of Appeals held that Mary Lou Ander-

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[3] Included in Respondent's objection was the argument that introduction of the former testimony would include introduction of her denial of the "deal" which, Respondent urged, "we know is not true." That argument was grounded upon *Burkhalter v. State*, 493 S.W.2d 214 (Tex. Crim. App. 1973), *cert. denied sub. nom. Texas v. Burkhalter*, 414 U.S. 1000 (1973), a celebrated Texas case applying *Giglio v. United States*, 405 U.S. 150 (1972), *Napue v. Illinois*, 360 U.S. 264 (1959), and other related decisions pertaining to the Due Process rights requiring disclosure of exculpatory evidence and prohibiting knowing introduction of false evidence by a prosecutor (R. 764-65).

[4] The extent to which an agreement existed was the subject of some controversy. However, Petitioner has not taken the position that no agreement existed and does not take that position here.

son's testimony from Respondent's first trial was *permanently* tainted because of the prosecutor's failure at the trial to disclose the agreement. The conviction accordingly was reversed. *Granger v. State,* 653 S.W.2d 868 (Tex. App.—Corpus Christi 1983). The Texas Court of Criminal Appeals granted discretionary review.[5]

The Court of Criminal Appeals rejected Respondent's claim that the testimony was permanently tainted and overruled the Court of Appeals in that respect. Nevertheless, the Court reversed the conviction, holding that the introduction by the prosecution of the entire transcript of Mary Lou Anderson's testimony—including her denial of any "arrangement" with the State—amounted to a violation of *Napue v. Illinois,* 360 U.S. 264 (1959) (holding that where the prosecution allows one of its witnesses to assert falsely that his testimony was given without promise of sentence reduction, a violation of Due Process results). The Court of Criminal Appeals arrived at the further conclusion, contrary to the assertions of the State, that other evidence conclusively showing the terms of the agreement and its result did not cure the error. *Granger v. State,* — S.W.2d —, No. 316-83 (Tex. Crim. App., September 19, 1984).

The State of Texas filed a timely Motion for Rehearing, which again and in greater detail urged that any error was cured. More particularly, the State asserted that the curative evidence was not merely of "other grounds for believing that the witness . . . may have had an interest in testifying against [the accused]" (held insuf-

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[5] *See* TEX. CODE CRIM. PROC. ANN. art 44.45 (Vernon Supp. 1984).

ficiently curative in *Napue v. Illinois, supra),* but that it was a complete correction of any false impression which may have resulted from Mary Lou Anderson's original testimony. Further, the motion claimed harmless error. *E.g., Chapman v. California,* 386 U.S. 18, 24 (1967). The Motion for Rehearing was overruled on January 23, 1985.

The opinion of the Court of Criminal Appeals articulates no non-federal grounds in support of the result.

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ARGUMENT

I.

As early as the decision in *Mooney v. Holohan,* 294 U.S. 103 (1935), this court has held that a "deliberate deception of the court and jury by the presentation of testimony known to be perjured" constituted a violation of the Due Process clause of the Fourteenth Amendment. 294 U.S. at 112. In *Pyle v. Kansas,* 317 U.S. 213 (1942), the Court extended that rule to include suppression of testimony favorable to the accused. The rule again was extended in *Alcorta v. Texas,* 355 U.S. 28 (1957), to require affirmatively that the prosecutor take steps to correct a false impression given to the jury and known to be false by the prosecution.

Napue v. Illinois, 360 U.S. 364 (1959), was decided against that background. There, the prosecution, knowing it to be false, had allowed to go uncorrected testimony asserting that the witness had been offered no recommendation of sentence reduction. The pertinent holding in

Napue was two-pronged:[6] First, the court held that a conviction must fall under the Fourteenth Amendment where the State either knowingly either uses false evidence or allows to go uncorrected false evidence which surfaces. 360 U.S. at 269. Second, the Court held that the fact that the jury was apprised of *other grounds* for believing that the witness had an interest in testifying against the accused did not remove the taint caused by the elicitation of false testimony that no sentence-reduction recommendation had been promised. 360 U.S. at 270. It is the latter holding which the Texas Court of Criminal Appeals incorrectly broadened in the case at bar.

As a logical extension of the primary principle of that line of cases, *Brady v. Maryland,* 373 U.S. 83 (1963), and *Giglio v. United States,* 405 U.S. 150 (1973), imposed upon the prosecution the burden of disclosure to the defense any exculpatory evidence. *See also Giles v. Maryland,* 386 U.S. 66, 73 (1967) (acknowledging the common ground of *Napue, Brady,* and *Giglio).*

The knowing use of false evidence by the prosecution does not require *automatic* reversal. A new trial is required only where there is reasonable likelihood that the false testimony could have affected the judgment of the jury. *Napue, supra,* 360 U.S. at 271; *Giglio, supra,* 405 U.S. at 154. That rule parallels the general harmless error rule that a conviction will not be overturned for a federal constitutional error which is harmless beyond a reasonable doubt. *Connecticut v. Johnson,* — U.S. —,

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[6] The court also addressed the issue of the extent to which factual conclusions of state courts bind this Court, 360 U.S. at 271-72, which has no relevance to this case.

103 S.Ct. 969, 975 (1973); *Chapman v. California*, 386 U.S. 18, 24 (1967).

II.

In the case at bar, it is conceded that Respondent's conviction was grounded in large part upon the testimony of his accomplice, Mary Lou Anderson. Because of her recalcitrance, the trial prosecutor was forced to use her transcribed testimony from Respondent's first trial. The bulk of that testimony (including cross examination) was read to the jury, within which was her assertion that there existed no promise or understanding that the prosecution would agree to reduction of her death sentence as a result of her testimony. Although the prosecution may have been aware of the misrepresentation included therein, Respondent's counsel already had demonstrated fully (outside the presence of the jury) his own cognizance of the pertinent facts.

After the State rested its case, Respondent offered the testimony of the witness's former attorney and of the prosecutor, developing the facts that (1) immediately after her testimony, Mary Lou Anderson's death sentence was—in effect—changed to fifty (50) years, and (2) she had at least some expectation of sentence reduction. Respondent could have called at least two other available witnesses whose testimony would have further illuminated the situation. For reasons not apparent from the record, no effort was made to elicit before the jury their testimony.

III.

The issue here is whether a violation of the rule prohibiting a prosecutor from knowingly sponsoring false testimony either is cured or is rendered harmless where the

pertinent circumstances have been disclosed to and were fully known by counsel for the accused, who thereafter is given and takes full advantage of the opportunity to demonstrate that falsity to the jury. The Texas Court of Criminal Appeals incorrectly relied upon that portion of *Napue v. Illinois, supra,* which holds that the taint is not removed by "the fact that the jury was apprised of *other grounds* for believing that the witness . . . may have had an interest in testifying against [the accused]." 360 U.S. at 270 (emphasis added). In this case, the entire incentive to the witness was revealed to the jury (at least to the extent desired by Respondent's counsel) by evidence including the prosecutor's own testimony.

No harm resulted. Moreover, the court did not look to the general harmless error rule. Instead, the court construed *Napue v. Illinois, supra,* as hereinbefore indicated, rather than addressing the question of whether there existed a reasonable possibility that the evidence might have constributed to the conviction, *Chapman v. California,* 386 U.S. 18, 23 (1967), or the question of whether the error was harmless beyond a reasonable doubt. *Id.,* 386 U.S. at 24. *Accord: Connecticut v. Johnson,* — U.S. —, 103 S.Ct. 969, 975 (1973).

In the final analysis, the challenged evidence was helpful to the accused. Once the testimony of the prosecutor and of the witness' former attorney had been presented, it was clear to the jury that part of the witness' testimony was less than candid. As a result, a shadow was cast upon the remainder of it. In fact, Respondent's counsel seized upon the discrepancy in his final argument:

> [S]he told that jury [in the trial from which her testimony was read] that there was no deal, that she wasn't promised anything and that that lawyer, her lawyer, had made no deal with anyone . . . . To me, that's pretty crucial that she got the death penalty and she has every reason in the world to get on that stand and testify because at that time, it's going to help Mary Lou Anderson get off death row . . . and that's why we offered Mr. Van Slyke who was [Anderson's] lawyer, that there certainly was one ["a deal"], that it had been conveyed to Mary Lou Anderson .... (R.1062-63).

Application of the proper harmless error standard would have changed the result, particularly in view of the Respondent's reliance upon the evidence about which he now complains.

For the foregoing reasons, the court should grant a writ of certiorari to the Court of Criminal Appeals.

DATED: March 25 ,1985

Respectfully submitted,

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APPENDIX A

OPINION OF THE TEXAS COURT
OF CRIMINAL APPEALS

FERYL JOHN GRANGER,
Appellant,

NO. 316-83

v.

THE STATE OF TEXAS,
Appellee.

Petition for Discretionary Review from the
Court of Appeals, Thirteenth Supreme Judicial
District of Texas (Victoria County)

OPINION ON APPELLANT'S AND STATE'S
PETITION FOR DISCRETIONARY REVIEW

Trial was before the jury for the murder of Steve Anderson. After finding appellant guilty, the jury assessed punishment at life. On appeal the Corpus Christi Court of Appeals (13th District) reversed the conviction. See Granger v. State, 653 S.W.2d 868 (Tex.App.—Corpus Christi 1983). We granted the State's petition for discretionary review to examine the Court of Appeals' holding that the accomplice witness' testimony given at appellant's former trial was improperly admitted at his second trial. The Court of Appeals held that although the witness was "unavailable" at the second trial, reading her former testimony into the record was improper because appellant was denied effective cross-examination of the witness at the time that she gave the testimony at the first trial. According to the court, the cross-examination was

ineffective because the State failed to disclose to appellant at his first trial that it had an "understanding" with the witness to reward her for her testimony. We also granted appellant's petition for discretionary review to examine the Court of Appeals' holding that the nonaccomplice testimony sufficiently corroborated the accomplice witness' testimony, and that such evidence was sufficient to sustain the conviction.

The record reflects that on January 3, 1978, the bound and gagged bodies of Steve Anderson and his wife Marjorie Anderson were found in their home in Sugarland, by Marjorie Anderson's daughter Joan Maresh. The Andersons died from multiple gunshot wounds to the head. Mary Lou Anderson, Steve Anderson's daughter, was originally indicted along with appellant for the capital murder of the Andersons. Mary Lou Anderson was convicted of the capital murder of Steve Anderson and assessed punishment at death. Subsequently she testified for the State at appellant's capital murder trial and he was also convicted and assessed death. Within ten days after testifying against appellant, Anderson was granted a new trial and pled guilty to murder, and was assessed fifty years by the court. In Granger v. State, 605 S.W.2d 602 (Tex. Cr.App. 1980), we reversed appellant's capital murder conviction because the nonaccomplice testimony failed to sufficiently corroborate the element of remuneration which was necessary to sustain the conviction. We noted that appellant could be retried for the lesser included offense of murder.

Appellant was reindicted for murder. At his second trial, the State called Mary Lou Anderson as a witness, but she refused to testify. Although the State offered her

immunity with the court's consent, and the court ordered her to testify, she steadfastly refused to testify and was held in contempt. Over objection, the State was allowed to read her testimony given at appellant's capital murder trial.

On appeal before the Court of Appeals, appellant challenged the use of this former testimony. The Court of Appeals held that the testimony of a witness given at a former trial of the defendant for the same offense is admissible upon retrial if the witness is "unavailable" and if the defendant had the opportunity to effectively cross-examine the witness at the prior proceeding.

After holding that the witness Anderson was in effect "unavailable" because of her refusal to testify, the court examined the adequacy of the cross-examination of Anderson at the first trial and concluded that the witness was not effectively cross-examined and thus her prior testimony was erroneously admitted into evidence. The ineffective cross-examination was due to the State's failure to disclose to appellant at his first trial that Anderson's testimony was induced by an arrangement with the State to reduce her punishment of death to a term of years. The court held that the nondisclosure contravened the holdings of Burkhalter v. State, 493 S.W.2d 214 (Tex.Cr. App. 1973) and Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972):

> "By whatever description, 'deal,' 'arrangement,' 'or tacit understanding,' the fact is that the State agreed to reward Mary Lou Anderson for her testimony by reducing her death sentence to a term of years. This was known to the presiding judge, the prosecutor, [Anderson's] defense attorney and Anderson. Yet

> Anderson was allowed to mislead the jury by denying that this played any part in her motivation to testify against appellant . . .
>
> "Although cross-examined about her motives, Anderson did not equivocate. As such, counsel for appellant was unable to develop the extent of any deal between the State and Anderson. Furthermore, in allowing Anderson to testify that no deal or expectation existed, the State recklessly mislead the jury about Anderson's motives and prevented an effective cross-examination of Anderson.
>
> "This situation brings the case within the rules announced in *Burkhalter,* [supra, 493 S.W.2d 214] and *Giglio* [supra, 92 S.Ct. 763]. *As such we find that the non-disclosure of the arrangements made between the State and the witness Anderson deprived appellant of his right to effective cross-examination.*" 653 S.W.2d at 876 (emphasis supplied).

The court further held that such error was not cured in the second trial by testimony that informed the jury of the "understanding" between Anderson and the State because such disclosure could not remedy the ineffective cross-examination at the former trial.

We agree with the Court of Appeals' conclusion that an agreement did in fact exist between the State and the witness, and that it should have been presented to the jury in appellant's first trial under the principles of Burkhalter v. State, supra.[1] However, we must examine the court's holding that the error which occurred at the first trial was incurable at a subsequent trial.

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[1]The record clearly reflects that there was in fact an agreement, albeit a tacit one, to reward Anderson for her testimony. The evidence of this agreement is set out in the opinion of the Court of Appeals, 653 S.W.2d at 874, 875.

In Burkhalter v. State, supra, an accomplice witness on cross-examination denied the existence of a deal with the State. The conviction was reversed because the court improperly refused to allow the defendant to prove the agreement by calling the witness' lawyer to testify. We stated that even assuming that the witness did not know of the agreement, "the prosecutor's silence as to the plan not to prosecute conveyed an impression to the jury which the State knew to be false and one which should have been corrected." Id., 493 S.W.2d at 218. Furthermore, we stated that due process demands that the "State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction. This rule does not cease to apply merely because the false testimony goes only to the credibility of a witness." Id. We stated in *Burkhalter,* however, that the State could have prevented a denial of due process by revealing to the jury that there was in fact an agreement with the witness.

In the instant case, Anderson was cross-examined extensively by appellant's counsel at the first trial about the murder in question. He also asked her repeatedly if her testimony was induced i. any way by an agreement with the State, which she persistently denied. It appears from the record that appellant and his counsel were not told about the State's arrangement at the first trial. Had the State disclosed the arrangement after Anderson testified, this would have impeached her credibility, and cured any due process violations. See Burkhalter v. State, supra.

Accordingly, we cannot agree with the Court of Appeals' statement that Anderson's testimony was permanently tainted because of the nondisclosure of the State's arrangement with Anderson at the first trial.

Nevertheless, we agree that the conviction should be reversed because of the manner in which the State used Anderson's testimony at appellant's trial below. At no time did the State concede that it had an arrangement with Anderson or her attorney. In fact, the State read into the record Anderson's former testimony denying any arrangement with the State.[2]

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[2]The State read the following into the record:

"Q. [By Mr. Adamo, appellant's counsel at the first trial] Isn't it true, Mrs. Anderson, that you have expectation and a hope that after you testify, the State will work something out with your lawyers to come off of the death sentence, to work out some term of years other than death?

"A. [By Anderson] No, sir.

"Q. You have no expectation of that whatsoever?

"A. No, I don't.

"Q. Is it true that it has been communicated to you from your attorney . . . that all you have to do is trust the prosecutor and he wil work something out for you?

"A. No, sir.

"Q. . . . why are you testifying in this case? Let me ask you that.

"A. Because Feryl killed my parents and I just felt like I should tell my part of it.

" . . .

"Q. [By Mr. Adamo] Now, isn't it a fact that the reason that you're testifying here today is to save your life?

"A. [Anderson] No, sir.

" . . .

"Q. Isn't it a fact that you received a communication to trust your lawyer and trust the prosecutor, although they won't promise you anything about the death case now, you are expecting something to happen?

"A. No, sir."

The State contends that any error was cured because appellant was allowed to call Anderson's attorney at the second trial, who testified in front of the jury about the arrangement. The jury also knew that Anderson's death sentence had been reduced to fifty years.

A similar contention was raised and rejected in Napue v. Iilinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). In *Napue,* an accomplice witness testified falsely on cross-examination that he had received no promise of consideration in return for his testimony. The Illinois Supreme Court found that although this testimony was false and the State knew it to be so, the defendant was not entitled to relief "since the jury had already been apprised that [the public defender] 'was going to do what he could' in aid of [the witness], and 'was trying to get something did [sic]' for him." The United States Supreme Court reversed, stating in part:

> "It is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment . . . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears . . .
>
> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of a witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testify-

ing falsely that a defendant's life or liberty may depend . . .

"*We do not believe that the fact that the jury was apprised of other grounds for believing that the witness . . . may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one.*" 79 S.Ct. at 1177 (emphasis supplied).

In the instant case not only did the State stand silent when Anderson testified falsely at the first trial, it offered such false testimony at appellant's second trial. We do not believe that the conflicting evidence regarding the arrangement presented to the jury is sufficient to turn "what was otherwise a tainted trial into a fair one." Napue v. Illinois, supra. Under Giglio v. United States, supra, a new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. 92 S.Ct. at 766. It is clear that appellant could not have been convicted without Anderson's testimony. Under these circumstances we cannot conclude that the judgment of the jury could not have been reasonably affected by this testimony, and thus the conviction must be reversed.

Turning to the sufficiency of the evidence, we note that this is a circumstantial evidence case. On appeal, this Court must view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Wilson v. State, 654 S.W.2d 465 (Tex.Cr.App. 1983).

Mary Lou Anderson's testimony, read into evidence by the State from the record of appellant's capital murder trial, revealed the following: In late 1977, Anderson was in financial difficulty because of bad checks she had

written. She discussed several schemes for raising money with appellant, and told him that she was the beneficiary of a $5,000.00 life insurance policy which she had taken out on her father's life. On the evening of January 2, 1978, appellant came to her apartment in LaFayette, Louisiana, and informed her that he was going to kill her parents. She accompanied appellant to the apartment of Darryl Comeaux where they borrowed a Monte Carlo automobile and obtained a .25 caliber pistol. They went to the Hacienda lounge for a short while and then drove to Texas, stopping to spend the night in Beaumont. On January 3, 1978 they went to a Gibson's store in Beaumont where appellant purchased tape and Anderson purchased a box of .25 caliber ammunition. After leaving Beaumont, they had a flat tire near Houston and were given a ride to a nearby service station where appellant purchased a tire. They replaced the tire and proceeded to Sugarland, arriving about 6:00 p.m. After driving past Anderson's father's home, appellant stopped the car, put out the rear license light and tied Anderson with a rope, telling her he would kill her and her son if she tried to escape or if she said anything. They returned and parked near her father's home, and appellant entered the house, returning ten to fifteen minutes later with blood on his gloves and a "wild-eyed" look. As they left Sugarland, appellant drove the wrong way on a one-way street, passing a patrol car. Later, on their way back to Louisiana, Anderson threw the excess ammunition out of the window and appellant threw the gun and gloves off of a bridge.

The bodies of Steve and Marjorie Anderson were found at approximately 6:40 p.m. on January 3, 1978 by Marjorie Anderson's daughter. Dr. Joseph Jachimczyk,

the Harris County Medical Examiner, performed the autopsies on the bodies and testified that both victims were bound at the wrists and gagged with adhesive tape. Each had been shot three times in the head and he recovered .25 caliber slugs from the bodies.

Before deciding whether this evidence is sufficient to sustain the conviction, we must determine whether the testimony of Anderson, an accomplice witness, is sufficiently corroborated as required by Art. 38.14, V.A.C.C.P., which provides:

> "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."

In Edwards v. State, 427 S.W.2d 629 (Tex.Cr.App. 1968), this Court wrote:

> "The test as to the sufficiency of the corroboration is to eliminate from consideration the evidence of the accomplice witness and then to examine the evidence of other witnesses with the view to ascertain if there be inculpatory evidence, that is evidence of incriminating character which tends to connect the defendant with the commission of the offense. If there is such evidence, the corroboration is sufficient; otherwise it is not." 427 S.W.2d at 632.

All the facts and circumstances in evidence may be viewed to furnish the necessary corroboration, and the corroborative evidence may be circumstantial or direct. Paulus v. State, 633 S.W.2d 827 (Tex.Cr.App. 1981). However, it is not necessary that the corroboration directly link the accused to the crime, or be sufficient in itself to establish guilt. Id.; see also Attwood v. State, 509 S.W.2d 342 (Tex.

Cr.App. 1974); Reynolds v. State, 489 S.W.2d 866 (Tex. Cr. App. 1972).

Darryl Comeaux testified that on January 2, 1978, appellant and Anderson came to his apartment in Lafayette, Louisiana and appellant asked to borrow a car and a gun. Comeaux loaned appellant a Monte Carlo, and went with appellant to Comeaux's brother's residence where appellant borrowed a .25 caliber gun. Comeaux did not know when the car was returned, but stated that he saw appellant "a while after" and asked him about the gun. Appellant stated that he "got in a bind" and "got rid of" the gun. Comeaux also testified that one of the tires on the Monte Carlo had been replaced.

Thomas Collone, the manager of the Hacienda Lounge in LaFayette, and who had known appellant for over 10 years, testified that on the evening of January 2, 1978, appellant came into the club and asked him if he could borrow .25 caliber shells.

Two employees of the Beaumont Gibson's store testified at trial. One testified that on January 3, 1978 she sold a box of .25 caliber bullets to Anderson who was required to sign her name and present identification. The other witness testified that on the same date, she sold appellant two rolls of curity brand adhesive tape.

The owner of a service station at Winnie, testified that he sold a tire to appellant on January 3, 1978. He identified the tire taken from the Monte Carlo as the same type of tire sold by him on that date.

A convenience store clerk in DeWalt, approximately eight miles from Sugarland, testified that she sold cigarettes and beer to appellant "on or about the 1st day of January, 1978."

John Claussen, a police officer in Sugarland, testified that on the evening of January 3, 1978, he passed a Monte Carlo with Louisiana plates going the wrong way on a one-way street in Sugarland. A few minutes later he was flagged down by Joan Maresh, Marjorie Anderson's daughter, who took him to the murder scene. He testified that the bodies were bound and gagged with adhesive tape, that he found seven .25 caliber casings at the scene, and that he found a blood-smudged spool of tape in the Andersons' yard.

Officer L. J. Bertrand of the Louisiana State Police testified that he located the Monte Carlo in Louisiana and recovered a new tire from it. He also found a live .25 caliber round in the Monte Carlo.

We conclude that the nonaccomplice testimony in the instant case tended to connect appellant with the offense and thus was sufficient to corroborate the accomplice testimony of Anderson. The corroborating testimony placed appellant near the scene of the crime at the time of its commission. See Passmore v. State, 617 S.W.2d 682 (Tex. Cr.App. 1981). Furthermore it placed appellant in the company of the accomplice. Finally it provided evidence of incriminating character by showing that appellant borrowed a .25 caliber gun which he later got rid of, that he purchased adhesive tape on the date of the offense, and that he borrowed a Monte Carlo. The evidence showed that the victims were killed by .25 caliber bullets and were

bound and gagged with adhesive tape. Furthermore a Monte Carlo was seen near the scene and later, the Monte Carlo appellant borrowed was found to have a new tire on it purchased in Texas, and a live .25 caliber bullet was found in the same car.

Since Anderson's testimony was sufficiently corroborated, we find the evidence to be sufficient to sustain the conviction. As heretofore noted, we further agree with the Court of Appeals' conclusion that the judgment of the trial court must be reversed, but we hold that reversal is mandated due to the State's nondisclosure *at the trial below* of an agreement for leniency in exchange for Anderson's testimony. The judgment of the Court of Appeals is affirmed.

TOM G. DAVIS, Judge

(Delivered September 19, 1984)

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84-1530

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NO. 84-1530

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE STATE OF TEXAS,
Petitioner,

VS.

FERYL JOHN GRANGER,
Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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INTRODUCTION

Petitioner, THE STATE OF TEXAS, has served and filed a Petition for Writ of Certiorari to the Texas Court of Criminal Appeals. This Brief is presented on behalf of the Respondent, FERYL JOHN GRANGER, in Opposition to the Petition for Writ of Certiorari, in accordance with Rule 22 of the Rules of the Supreme Court.

Respondent was originally convicted of Capital Murder. This conviction was based on the testimony of a Mary Lou Anderson, an accomplice. When she testified she testified that she had no expectation of reduction of her own death sentence in return for that testimony. The Respondent was convicted of Capital Murder and in an appeal the Texas Court of Criminal Appeals reversed Respondent's first conviction, holding that the evidence was insufficient to corroborate.

The Respondent was tried again for Murder and Mary Lou Anderson refused to testify. The prosecutor then read into evidence at the second trial the prior testimony of Mary Lou Anderson. The State again read into evidence the fact that Mary Lou Anderson stated there was no promise of any deal or other leniency. The State took the position at all of the trials that there was no agreement, deal, or tacit understanding, and even took that position on the appeals of the cases.

The Respondent was convicted and appealed this case, and this conviction was reversed by the Texas Court of Appeals, as well as the Texas Court of Criminal Appeals.

ARGUMENT AND AUTHORITIES

The Respondent submits that pursuant to Rule 17 of the Rules of the Supreme Court, this is not a proper case for the grant of a Writ of Certiorari. As Rule 17 indicates, review on Writ of Certiorari is:

> "Not a matter of right, but of judicial discretion, will be granted only when there are special important reasons therefore."

That surely there can be no reasonable doubt that the questions presented do not rise to the level of legal importance which will support the grant of a Writ of Certiorari.

The Petitioner is also wrong where he indicates that the Petitioner had not taken the position that no agreement existed. It has been the position of the Petitioner throughout all of the trials and all of the appeals that there was no agreement, understanding, or tacit agreement.

The Petitioner took the position at the trial of the case that there was no understanding or agreement and offered Mary Lou Anderson's testimony into evidence in the entirety. They at no time indicated to the jury that there was no understanding or agreement and contested the

issue throughout the second trial. This left the impression with the jury that it was the State's position that there was no agreement or understanding, and therefore, the State again used the tainted testimony of Mary Lou Anderson successfully and left the jury with the impression there was no understanding.

This brings this case directly in point with Napue v. Illinois, 360 U.S. 264 (1959).

There is no question that the introduction of this evidence contributed to the conviction of this Respondent. There should be no question that error was harmful beyond a reasonable doubt, to the Respondent.

The Respondent disagrees with the Petitioner that the challenged evidence was helpful to the accused. The State took the position then that there was no understanding or agreement in that trial, and not one (1) time did they let the jury know that there was any agreement or understanding. In effect still misdleading the jury as to the truth.

CONCLUSION

Your Respondent respectfully submits that circumstances are totally lacking in this matter such as to justify the grant of a Writ of Certiorari and the Respondent requests that the Petition in this matter be denied completely.

Respectfully submitted,

FOSTER, POPE & ORSAK

By _____

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CERTIFICATE OF SERVICE

I, LOGENE L. FOSTER, Court Appointed Counsel for the Respondent, FERYL JOHN GRANGER, do hereby certify that a true and correct copy of the above and foregoing Brief in Opposition to Petitioner's Writ of Certiorari to the Texas Court of Criminal Appeals was forwarded to the District Attorney's Office of Fort Bend County, Texas, as well as to Mr. CLYDE F. DEWITT, III, Special Prosecutor by Appointment of William A. Meitzen, by Certified Mail, Return Receipt Requested on this the 24th day of April, 1985.

LOGENE L. FOSTER